LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 19 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 247

STATE OF TEXAS EX REL. J. M. FALKNER, BANKING COMMISSIONER OF TEXAS,

Petitioner

v.

NATIONAL BANK OF COMMERCE OF SAN ANTONIO AND BROADWAY NATIONAL BANK OF ALAMO HEIGHTS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

G. W. PARKER, JR.
Fort Worth National Bank Bldg.
Fort Worth, Texas

JOHN J. COX
National Bank of Commerce Bldg.
San Antonio, Texas

IRELAND GRAVES
ROBERT J. HEARON, JR.
Capital National Bank Bldg.
Austin, Texas

August 18, 1961

Baldwin Printing Company, Inc., 209 West 8th Street, Austin, Texas

Table of Contents

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Argument	
I. The decision below is clearly correct	7
II. There is no conflict of decision	10
III. There is no important question of unsettled federal law	12
Conclusion	13

Cases	Page
Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960)	9
First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1923)	8-9, 11
Franklin National Bank v. New York, 347 U.S. 373 (1954)	8, 10-11
Inland Waterways Corporation v. Young, 309 U.S. 517 (1940)	8
Standard Oil Company v. Johnson, 316 U.S. 481 (1942)	9-10
T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959)	11
United States v. Papworth, 156 F. Supp. 842 (N.D. Tex. 1957), aff'd 256 F.2d 125, cert. den. 458 U.S. 854	6

Constitution and Statutes

Texas Constitution, Article XVI, §16	2, 5
Texas Civil Statutes, Article 342-903	2, 5
12 U.S.C. §36	2, 5, 6, 7, 8, 9
12 U.S.C. §90	2, 3, 8, 10, 13
12 U.S.C. §265	2, 3, 4, 8, 10, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 247

STATE OF TEXAS EX REL. J. M. FALKNER, BANKING COMMISSIONER OF TEXAS,
Petitioner

v.

NATIONAL BANK OF COMMERCE OF SAN ANTONIO AND BROADWAY NATIONAL BANK OF ALAMO HEIGHTS,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The District Court filed no formal opinion, but made extensive findings of fact and conclusions of law which are set forth in Appendix B of the Petition at pp. 16-23. The opinion of the Court of Appeals for the Fifth Circuit (per Chief Judge

Tuttle, joined by Judge Brown), and Judge Hutcheson's dissenting opinion (App. B of Petition at pp. 25-37) are reported at 290 F.2d 229.

Jurisdiction

The Petition adequately sets forth the jurisdictional requisites.

Question Presented

Whether the Secretary of the Treasury has the authority under 12 U.S.C. §§90 and 265 to authorize and direct the Respondent banks, as financial agents of the United States, to operate limited banking facilities, at which checks are cashed and deposits received, at the military installations here involved.

Statutes Involved

The pertinent portions of sections 90 and 265 of Title 12 U.S.C. are set forth in the Petition at pp. 12-13. The federal statute dealing with "branch banking" by national banks is 12 U.S.C. §36, and the Texas provisions on that subject are Article XVI, §16 of the Texas Constitution and Article 342-903 of the Texas Statutes (Petition, pp. 11-15).

Statement

The many new and temporary military installations springing up over the country at the outset of World War II were often in need of banking services which the nearby civilian community could

not supply (R. 85). This need encompassed not only the large payroll, and other, requirements of the finance officer, but extended as well to the individual need of military and civilian personnel stationed or employed at the base for a banking facility where, at the least, checks could be cashed and deposits made (Def. Ex. 18, R. 386). An initial effort was made to meet this problem by encouraging the establishment of new commercial banks, or branches in those states where they were permitted (R. 86, Def. Ex. 18, R. 386). But quite obviously commercial banks and branches could not be opened, expanded, modified and closed with the rapidity necessary to meet the fluctuations in the requirements of the installations (R. 86-7).

In 1942 the War and Treasury Departments jointly turned to the program here challenged by Texas—the employment of banks as agents of the federal government to operate limited banking facilities (R. 87, Def. Exs. 14, 22, R. 370, 432). Historically, the government had long had the express power to employ national banks as agents (§45 of the National Bank Act of 1864, 12 U.S.C. §90) and in 1942 Congress granted the Secretary of the Treasury the power to employ all *insured* banks (a category which includes all national banks and many state banks) as financial agents (12 U.S.C. §265).

The request for a facility is initiated by the installation, reviewed by the service concerned, independently investigated by the Treasury, and

granted only when existing banks in the area are inadequate to meet the need (R. 92-5, 177-181). The facility renders only such services as are specified by the Treasury, but these generally include the acceptance of deposits and the cashing of checks. (Def. Ex. 10, R. 349). The facilities operated by the Respondent banks were originally opened in 1943 (Def. Exs. 3, 6; R. 310, 319), closed in 1946, and re-opened in 1949 (Def. Exs. 4, 7; R. 314, 323). Shortly before the trial 266 banking facilities were being operated at 52 Army, 109 Air Force, 82 Navy, 12 Veterans Administration, and 9 other federal installations in 45 states by 189 national and 61 state banks (R. 410). Since 1942 approximately 700 banking facilities have been opened, and of these approximately 415 have been closed (R. 102).

Insured state banks, when designated as financial agents under §265, have been authorized to operate banking facilities. But no state banks have been so directed in Texas out of deference to the view of the Texas officials that the operation of such a facility violates the local branch banking prohibitions (R. 95-6).

A banking facility is entirely subject to regulation by the Treasury Department (R. 111), which is in turn guided by the needs of the military service concerned, and the availability of normal commercial banking services in the adjoining community. The Comptroller of the Currency, charged with supervision of national banks generally, is not concerned with the opening, operation, or termination

of a banking facility (R. 95, 160). The facility normally operates at a loss, because the usual money-making functions of banking are not performed (R. 99). The operating loss is offset by a deposit in the operating bank of Treasury funds, the "earning value" of which will reduce the loss to almost nothing (R. 99-100). If required reports show an increase in facility income, the deposits are immediately reduced (R. 101).

The District Court's findings of fact (Petition, pp. 16-21), based upon a very full record, recite the nature and history of banking facilities, and state that no services are performed by either of the Respondent banks at the facilities maintained by them other than those they are authorized and directed to perform as financial agents by the Secretary of the Treasury (Petition, p. 19).

Texas, through its Banking Commissioner and Attorney General, has in this action made a unique judicial challenge to Respondent's operation of these facilities at Randolph and Lackland Air Force Bases on the theory that they amount to branch banks, arguing that Congress (in 12 U.S.C. §36) has not permitted branching by national banks except in states where state banks are expressly authorized to branch, and pointing out that Texas does not permit state banks to branch (Texas Const., Art. XVI, §16; Article 342-903, Texas Statutes).

Respondents, to the contrary, urge that the Secretary's authority to employ banks as financial agents is not subject to restrictions placed on the

banks themselves, arguing that Congress merely intended by §36 to preserve competitive equality between state and national banks in a given state.

This same question had been earlier considered by the Attorney General of the United States and, in an opinion dated January 20, 1948, Mr. Justice Clark, then Attorney General, concurring in the conclusion of the Treasury's General Counsel, stated that there was "no justification for construing either 12 U.S.C. 36 or 12 U.S.C. 81 as limiting the broad authority vested in the Secretary of the Treasury to utilize national banks as depositaries of public moneys and financial agents of the Government." (Def. Ex. 19, R. 397, 402).

The same conclusion was reached by District Judge Estes in a criminal prosecution arising out of the robbery of a banking facility maintained at Carswell Air Force Base in Fort Worth, Texas. *United States v. Papworth*, 156 F. Supp. 842 (N.D. Tex. 1957), aff'd 256 F.2d 125, cert. den. 458 U.S. 864.

In the present case both District Judge Rice and the majority of the Fifth Circuit (Chief Judge Tuttle and Judge Brown) agreed, refusing to accord to Congress the unlikely intention Petitioner asserts it must have had—to subject the United States, in its employment of banks as its financial agents, to the same restrictions that the banks themselves are subject in their own commercial operations.

Argument

I.

The decision below is clearly correct.

The District Court concluded that 12 U.S.C. §36 does "not limit the authority of the Secretary of the Treasury under 12 U.S.C. §90 and 12 U.S.C. §265 to impose upon defendants the duties challenged by the plaintiff in this case which have been so imposed on them." (Finding of Fact No. 7; Petition, p. 23). The Court of Appeals, in equally emphatic language, has agreed:

> "The State of Texas thus bases its position on the *pari materia* argument that the provisions of §90 go only so far as is permitted by §36, i.e., that banking facilities authorized by §90 may, under §36, be opened only where state law permits them. The appellees and the government, on the other hand, urge that §90 is not in any way limited to §36.
>
> "Upon careful consideration of the statutory provisions thus placed before us, we are led to the conclusion that Section 90 must stand alone. We find nothing in either Section 36 or Section 90 to indicate that Congress intended any different result. It does in fact appear that the legislative history is such that it requires the construction of Section 90 as an independent statute." (Petition, p. 31; 290 F.2d 233.)

Granting of certiorari in this case could lead

only to approval of these conclusions, and affirmance of the judgment.

Congress, in 12 U.S.C. §§ 90 and 265, has imposed no restrictions on the utilization of national banks as financial agents. It has, in 12 U.S.C. §36, affirmatively granted permission to national banks to operate commercial branches, if state banks are so permitted in the state in question. While accepting state policies concerning commercial branch banks, Congress has given no indiction of its willingness to subject the free utilization of national banks as financial agents to regulation by 50 states. Petitioner's contrary argument seizes upon a technical comparison of two sections of Title 12, each of which covers an entirely separate area, and labors hard to construe these statutes into conflict rather than letting each serve its proper function in the national banking laws.

The national banking system embodies "a blend of governmental and private purposes." *Inland Waterways Corporation v. Young*, 309 U.S. 517 (1940). National banks are not subject to state laws which infringe upon the national banking laws, or which interfere with the performance of their duties as federal instrumentalities. See *Franklin National Bank v. New York*, 347 U.S. 373 (1954).

In the leading case of *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1923), the Court referred to the rule and the exception established by the basic, historic decisions in this field. The rule is that state laws apply to "dealings or con-

tracts" of national banks. The exception is that state laws do not apply when they interfere with the purposes of the national banks' creation, conflict with paramount laws of the United States, or *tend to impair or destroy the banks' efficiency as federal agencies.* Subjection of the Secretary's power to employ the banks as agents to the restrictions on the operation of commercial branches by national banks clearly impairs the efficiency of the banks as agents.

Another answer to Petitioner's argument that § 36 should be given overpowering effect and held to be a limitation on the power of the National Government to employ national banks as financial agents is supplied by a long line of decisions, the latest of which is *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), where the Court stated:

> "The law is now well settled that: 'A general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect.' *United States v. Wittek*, 337 U.S. 346, 358-359." 362 U.S. at 120

The Court of Appeals correctly points to *Standard Oil Company v. Johnson*, 316 U.S. 481, as supplying the principles applicable here. If, as held in the *Standard Oil Company* case, post exchanges are integral parts of the War Department and arms of the government immune from state regulation, banking facilities operated by agents of the government are completely analogous entities.

A banking facility is no more subject to state regulation than a post exchange.

Petitioner's effort to distinguish the *Standard Oil Company* case on the ground that the suit here is against a national bank, domiciled in Texas, and normally amenable to suit there, overlooks the fact that the post exchange decision likewise arose in a controversy between a state official and a resident of California—the Standard Oil Company. There is no such distinction as that attempted.

The record is full of evidence supporting the District Court's findings that the services rendered by the banking facilities in question are of benefit to the United States in that "they, *inter alia*, aid in the proper handling of official and semi-official funds, reduce absenteeism, and promote morale and personnel efficiency." (Finding of Fact No. 8; Pet., p. 20). Indeed, this finding does not appear to be disputed. The employment of the Respondent banks as financial agents to supply these services is fully justified by §§ 90 and 265, and the decisions of the courts below, adopting the long standing administrative interpretation to the same effect, are clearly correct.

II.

There is no Conflict of Decision.

In the course of the petition, counsel for Texas claims that the majority opinion of the Court of Appeals conflicts with the decisions of this Court in *Franklin National Bank v. New York*, 347 U.S.

373; *First National Bank v. Missouri*, 263 U.S. 640; and *T.I.M.E., Inc. v. United States*, 359 U.S. 464.

The Franklin National Bank case held simply that a New York statute forbidding national banks to use the word "savings" in advertising is invalid as in conflict with paramount federal laws declaring the right of national banks to accept savings deposits, when Congress did not "make this phase of national banking subject to local restrictions, as it has done by express language in several other instances." No conflict with that holding is presented by the decision in our case that Congress did not intend to subject the employment of national banks as agents to local restrictions.

First National Bank v. Missouri, previously mentioned, establishes the right of states to enquire into the exercise of powers by national banks when Congress has subjected the exercise of those powers to state control, but makes plain that state laws which impair the efficiency of national banks as federal agencies do not apply. No conflict with the decision in our case is at all apparent.

In *T.I.M.E., Inc. v. United States*, *supra*, this Court stated at p. 478:

> "But we do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed."

Petitioner's reference is prompted by the following remark found in the majority opinion of the Court of Appeals in this case:

> "It is clear . . . that Congress has long been appraised of this construction, and the fact that Congress has failed to enact legislation specifically repudiating the practice or placing the practice in a definite legislative scheme is sufficient indication that Congress has given its tacit approval to such facilities."

Without resorting to a full discussion of the legislative background to which the Court of Appeals here refers, it is sufficient to point out that the holding of the Court of Appeals was in no sense based upon its conclusion that Congress had approved the banking facilities program, for in the very next sentence the majority states:

> "We mention this legislative history principally because it is treated so extensively by the parties rather than as a basis for our decision."

There are no conflicts of decision here presented, and there is nothing in the way of conflict for this Court to resolve.

III.

There is no important question of unsettled federal law.

There can be no doubt that the banking facility program is of nation-wide scope and importance. But, Texas is the only state which has challenged it on the grounds here urged, and that challenge has been competently put to rest by the decisions

of the District Court and the Court of Appeals. While some states do have restrictions against branch banking, no other state official has made the claim here made by the Texas Banking Commissioner and Attorney General. The controversy which has arisen has therefore been settled, by a District Court and Court of Appeals conversant with the law of Texas, as well as the applicable laws of the United States. There is accordingly no occasion for the invocation of this Court's jurisdiction.

Conclusion

The Defense Department *and* the Treasury Department have collaborated to provide convenient facilities at certain military installations. To that end and no other has the Secretary of the Treasury made legitimate use of §§90 and 265. In so doing, the executive branch of the government has not transgressed state law. The decision of the Court of Appeals is manifestly correct. The Petition for Certiorari should be denied.

Respectfully submitted,

G. W. PARKER, JR.
Fort Worth National Bank Bldg.
Fort Worth, Texas

JOHN J. COX
National Bank of Commerce Bldg.
San Antonio, Texas

IRELAND GRAVES
ROBERT J. HEARON, JR.
Capital National Bank Bldg.
Austin, Texas

August 18, 1961

CERTIFICATE OF SERVICE

I, Robert J. Hearon, Jr., certify that I am a member of the Bar of the Supreme Court of the United States and am one of the attorneys of record for Respondents herein. I do further certify that copies of the foregoing have been forwarded by United States mail, postage prepaid, to Honorable Will Wilson, Attorney General, and Honorable C. K. Richards, Assistant Attorney General, Capitol Station, Austin, Texas and Honorable Morton Hollander, Chief, Appellate Section, Department of Justice, Washington 25, D.C.

.....

Attorney for Respondents